STATE OF MICHIGAN

COURT OF APPEALS

CAROLYN JEWELL and WILLIAM JEWELL,

Plaintiffs-Appellants,

v

LORNA PINSON, M.D., and LORNA PINSON, M.D., PLLC, and THERESA BARTOS HOLLADAY, D.O., and THERESA BARTOS HOLLADAY, D.O., PC, and W.A. FOOTE HOSPITAL, INC.,

Defendants-Appellees.

UNPUBLISHED
September 1, 2005

No. 255661
Jackson Circuit Court
LC No. 02-003254-NM

Before: O'Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right a trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) based on plaintiffs' failure to file a valid affidavit of merit with their medical malpractice complaint before the statute of limitations expired. We affirm.

Plaintiffs filed a medical malpractice complaint against defendants. Plaintiffs attached to their complaint three documents that were purportedly affidavits of merit as required by MCL 600.2912d. However, none of the affidavits were notarized, nor was there any indication that the affidavits were made under oath or affirmation. Defendant W.A. Foote Hospital (hereinafter defendant hospital) moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that under *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703; 620 NW2d 319 (2000), plaintiffs' complaint was barred by the statute of limitations because the affidavits attached to plaintiffs' complaint did not constitute valid affidavits under MCL 600.2912d(1) because they were not made under oath or affirmation and were not notarized. Therefore, defendant hospital contended, the purported affidavits did not qualify as affidavits and were insufficient to toll the statute of limitations. Defendant doctors also moved for summary disposition under MCR 2.116(C)(7).

The trial court granted defendants' motions for summary disposition pursuant to MCR 2.116(C)(7). In granting the motions, the trial court relied on this Court's opinion in *Holmes*, *supra*, and concluded that plaintiffs' purported affidavits of merit, which were not made under oath or affirmation and were not notarized, did not constitute valid affidavits of merit under

MCL 600.2912d(1) because they were not confirmed by oath or affirmation, they were not notarized, and they were completely void of a jurat.[1] The trial court also rejected plaintiffs' argument that defendants' motion for summary disposition based on plaintiffs' failure to comply with MCL 600.2912d(1) was barred by the equitable doctrine of laches. The trial court reasoned that defendants' motion for summary disposition was timely because it was filed shortly after plaintiffs' experts were deposed and because defendant hospital indicated in its affirmative defenses, which were filed on August 16, 2002, that plaintiffs had failed to file the affidavit of merit required by MCL 600.2912d and explicitly gave plaintiffs notice that defendants would move for summary disposition.

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Mouradian v Goldberg*, 256 Mich App 566, 570; 664 NW2d 805 (2003). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is time-barred. *Id.* at 571. In deciding a motion made under MCR 2.116(C)(7), a court should consider all affidavits, pleadings, and other documentary evidence submitted by the parties. *Holmes*, *supra* at 706. If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred. *Id.*

Plaintiffs first argue that the trial court erred in granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). According to plaintiffs, summary disposition in favor of defendants was improper even though the affidavits of merit attached to plaintiffs' complaint were not notarized. We disagree.

In a medical malpractice action, "the plaintiff . . . shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness." MCL 600.2912d(1). In *Holmes*, we held that an affidavit of merit which, like the affidavits of merit in this case, was not notarized, was not a valid affidavit of merit under MCL 600.2912d(1). Specifically, we stated:

> The unambiguous statutory language [in MCL 600.2912d(1)] demands that plaintiff or his attorney 'shall file with the complaint an *affidavit* of merit signed by a health professional.' MCL 600.2912d(1); MSA 27A.2912(4)(1) (emphasis added). To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *People v Sloan*, 450

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[1] A "jurat" is "[a] certification added to an affidavit or deposition stating when and before what authority the affidavit or deposition was made. • A jurat typically says 'Subscribed and sworn to before me this _____ day of [month], [year],' and the officer (usu. a notary public) thereby certifies three things: (1) that the person signing the document did so in the officer's presence, (2) that the signer appeared before the officer on the date indicated, and (3) that the officer administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document." Black's Law Dictionary (8th ed).

> Mich 160, 177, n 8; 538 NW2d 380 (1995); Black's Law Dictionary (7th ed). While plaintiff's document met the first two requirements, no indication exists that the information was provided under oath. Even if we assumed that the person who signed the statement affirmed its contents, no evidence establishes that the affirmation was made before a person authorized to administer an oath. [*Holmes, supra* at 711.]

Plaintiffs vigorously argue that *Holmes* was incorrectly decided, asserting that the opinion in *Holmes* is contrary to the rules of statutory construction and contrary to MCL 600.2301 and MCR 1.105. According to plaintiffs, the legislative history of MCL 600.2912d(1) indicates that the Legislature did not intend for the statute to require an affidavit to be notarized or made under oath or affirmation. We are bound by our decision in *Holmes* that an affidavit of merit, to be valid, must be confirmed by oath or affirmation and notarized. *Holmes* is a published opinion, and "[a] published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). "A Court of Appeals opinion published after November 1, 1990, is binding precedent not only on the lower courts, but on subsequent panels of the Court of Appeals." *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004).

We also reject plaintiffs' contention that their failure to notarize the affidavits of merit was merely a technical defect and that dismissal of their complaint was not warranted because the affidavits substantially complied with MCL 600.2912d(1). In *Scarsella v Pollak*, 232 Mich App 61, 64; 591 NW2d 257 (1998) *(Scarsella I)*, aff'd 461 Mich 547 (2000) *(Scarsella II)*,[2] we held that a medical malpractice complaint filed without an affidavit of merit was "insufficient to commence the lawsuit."[3] We further held that "because the complaint without an affidavit was insufficient to commence plaintiff's malpractice action, it did not toll the period of limitation." *Id.* In *Holmes*, we specifically rejected the argument, advanced by plaintiffs, that the filing of an unsworn affidavit was merely an inadequate or defective affidavit and held that the plaintiff's filing of an unsworn affidavit of merit constituted a complete failure "to provide a document meeting the definition of an 'affidavit.'" *Holmes*, *supra* at 712 n 4. Because the unsworn affidavits did not constitute the filing of an affidavit at all, they were insufficient to toll the period of limitations. *Id.* at 714. Therefore, relying on our opinion in *Holmes*, we hold that plaintiffs' filing of unsworn affidavits did not constitute affidavits under MCL 600.2912d(1) and that consequently, the purported affidavits were insufficient to commence the action and did not toll the period of limitations. The trial court properly ruled that plaintiff's action was time-barred.

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[2] In *Scarsella II*, the Supreme Court adopted this Court's holding in *Scarsella I* in its entirety. *Scarsella II*, *supra* at 548.

[3] We note that in *Scarsella I*, we specifically rejected plaintiffs' argument that a subsequently filed affidavit of merit that complied with MCL 600.2912d(1) should relate back to the original date of the filing of the complaint under MCR 2.118(D).

Plaintiffs next argue that the trial court erred in rejecting plaintiffs' contention that the doctrine of laches should have precluded defendants from moving for summary disposition based on plaintiffs' failure to comply with MCL 600.2912d(1) thirteen months after the commencement of the case. Plaintiffs also argue that the doctrine of equitable or judicial tolling should apply to avoid the running of the statute of limitations under the facts of this case. We disagree.

We review a trial court's equitable decisions de novo. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). We review for clear error the findings of fact supporting the trial court's equitable decision. *Id.*

We reject plaintiffs' contention that defendants should have been precluded from moving for summary disposition under the equitable doctrine of laches for three reasons. First, our Supreme Court has held that "[t]here is no statutory or case law basis for ruling that a medical malpractice expert must be challenged within a 'reasonable time.'" *Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001). Second, while defendants did not actually move for summary disposition until September 2003, defendant hospital explicitly gave plaintiffs notice that it intended to move for summary disposition based on the fact that plaintiffs' affidavits of merit did not comply with MCL 600.2912d(1) very early on in the proceedings. Defendant hospital filed its answer and affirmative defenses on August 16, 2002, and in its affirmative defenses, it specifically notified plaintiffs that it would move for summary disposition based on the fact that plaintiffs' affidavits of merit did not comply with MCL 600.2912d(1). Therefore, plaintiffs had notice of defendants' intent to move for summary disposition based on MCL 600.2912d(1) a mere three weeks and two days after plaintiffs filed their complaint. Third, laches only applies when the delay of one party has resulted in prejudice to the other party. *Yankee Springs Twp*, *supra* at 612. We reject any claim of prejudice to plaintiffs when defendants specifically alerted plaintiffs that their affidavits did not comply with MCL 600.2912d(1) and notified plaintiffs that they intended to move for summary disposition on this basis. Defendants' notice to plaintiffs that there were deficiencies in their affidavits of merit occurred well before the expiration of the statute of limitations and gave plaintiffs' counsel ample warning and opportunity to correct the deficiency in the affidavits of merit before the statute of limitations expired. Even with such notice from defendants, however, counsel for plaintiffs failed to cure the deficiencies in their affidavits of merit before the expiration of the statute of limitations. Under these circumstances, we simply cannot see how plaintiffs were prejudiced.

We also reject plaintiffs' request that this Court invoke the doctrine of equitable or judicial tolling to avoid the running of the statute of limitations in this case. In support of their argument, plaintiffs rely on our opinion in *Ward v Rooney-Gandy*, 265 Mich App 515; 696 NW2d 64 (2005), in which we applied the doctrine to avoid the running of the statute of limitations in a medical malpractice case in which the plaintiff, because of an inadvertent clerical error, neglected to file the correct affidavit of merit with his medical malpractice complaint.

We reject plaintiffs' reliance on *Ward* because while the majority in *Ward* justified the invocation of the doctrine of equitable tolling in that case, the equities involved in this case do not weigh as heavily in plaintiffs' favor as they did in *Ward.* In *Ward*, the plaintiff's noncompliance with MCL 600.2912d(1) was caused by an inadvertent clerical error. In contrast, in the instant case, plaintiffs' failure to comply with MCL 600.2912d(1) was not the result of a clerical error, but the result of plaintiffs' failure to notarize the affidavits as required by the

statute. *Holmes*, *supra* at 711. Second, in *Ward*, the plaintiff "diligently pursued his cause of action." *Ward*, *supra* at 521. In contrast, in the instant case, we find that plaintiffs did not diligently pursue their cause of action because they failed to file affidavits of merit that were notarized even though, at the time plaintiffs filed their complaint, this Court had already decided *Holmes*, *supra*, which specifically held that MCL 600.2912d(1) required an affidavit of merit filed with a complaint in a medical malpractice case to be notarized. *Holmes*, *supra* at 711. "An element of equitable tolling is that a plaintiff must exercise reasonable diligence in investigating and bringing his claim." *Ward*, *supra* at 520. We decided *Holmes* in 2000, and plaintiffs filed their complaint on July 24, 2002. Counsel for plaintiffs therefore should have known that MCL 600.2912d(1) required affidavits of merit to be notarized. Third, in *Ward*, the "[p]laintiff's counsel filed the correct affidavit of merit as soon as he became aware of the error." *Id.* at 523. In contrast, in the instant case, defendants specifically put plaintiffs on notice a mere three weeks and two days after plaintiffs filed their complaint that plaintiffs' affidavits of merit did not comply with MCL 600.2912d, yet plaintiffs failed to immediately correct the deficiency in their affidavits and instead waited until after the statute of limitations had expired to file affidavits of merit that were notarized.

In *Ward*, we observed that the doctrine of equitable tolling should rarely be invoked. *Id.* at 520. For the reasons articulated above, we find that the equities involved in this case do not warrant invocation of the doctrine to avoid the running of the statute of limitations.

Plaintiffs finally argue that the trial court erred in denying plaintiffs' motion to amend their complaint to add a claim based on the Clinical Laboratory Improvement Amendments of 1998 (CLIA), 42 USC 263a. We disagree.

We review the denial of a motion for leave to amend pleadings for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189, 193; 687 NW2d 620 (2004). To constitute an abuse of discretion, the result must be so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id.* at 193.

Leave to amend pleadings "shall be freely given when justice so requires." MCR 2.118(A)(2). Parties should be afforded great latitude in amending their pleadings before trial; however, the interest of giving free leave to amend pleadings must be weighed against the interest in the speedy resolution of disputes. *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 487; 652 NW2d 503 (2002), overruled on other grounds in *Elezovic v Ford Motor Co*, 472 Mich 408 (2005). A motion for leave to amend a pleading should be denied only for specific reasons such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility. *Franchino*, *supra* at 189-190. However, delay alone does not merit denial of a motion to amend unless the delay results in prejudice to the opposing party such that the party would be denied a fair trial. *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999). The prejudice must stem from the lateness of the allegations offered and not from the impact of those allegations on the ultimate disposition of the action. *Id.* The trial court should specifically state its reason for denying a motion to amend on the record. *Franchino*, *supra* at 190.

In this case, the trial court denied plaintiffs' motion for leave to amend based on plaintiffs' undue delay in moving for leave to amend. We find that the trial court erred in denying plaintiffs' motion to amend their complaint based on delay alone because defendants would not have been prejudiced by plaintiffs' delay because discovery had not been completed and trial was not scheduled to begin for seven months. Delay alone does not warrant denial of a motion to amend; rather, only delay resulting in actual prejudice suffices. *Jager, supra* at 487. Nevertheless, we will affirm when a trial court reaches the correct result for the wrong reason, *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001), and in this case the trial court properly denied plaintiffs' motion for leave to amend because any claim under 42 USC 263a would have been futile because the statute is a regulatory statute that does not create a private cause of action.

Even assuming that the CLIA was violated and that the violation harmed plaintiffs, such a violation "'does not automatically give rise to a private cause of action in favor of that person.'" *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd*, 472 Mich 479, 496; 697 NW2d 871 (2005), quoting *Touche Ross & Co v Redington*, 442 US 560, 568; 99 S Ct 2479; 61 L Ed 2d 82 (1979), quoting *Cannon v Univ of Chicago*, 441 US 677, 688; 99 S Ct 1946; 60 L Ed 2d 560 (1979). A private cause of action to enforce federal law must be created by Congress. *Id.* To determine whether plaintiffs have a private cause of action under the CLIA, it must be determined whether Congress intended to create such a cause of action. See *id.* There is a dearth of authority on this issue, and no case from this Court or our Supreme Court has addressed this issue. However, in *Wood v Schuen*, 760 NE2d 651 (Ind App, 2001), the Indiana Court of Appeals held that the CLIA did not create a private cause of action. Specifically, the court in *Wood* stated:

> Our research reveals that there is no authority in federal or state law for the proposition that CLIA provides a private cause of action to persons seeking relief for alleged violations of its provisions. Nearly every provision of CLIA explicitly delegates oversight of clinical laboratories . . . to the Secretary of Health and Human Services. . . . Nowhere is there an indication that CLIA was intended to create a private cause of action for those seeking relief for a laboratory's alleged violations of CLIA. [*Id.* at 658.]

While this Court is not bound by the Indiana Court of Appeals' decision in *Wood*, we are persuaded that the language of the CLIA does not create a private cause of action. We agree that there is no indication from the language of the CLIA "that Congress created or intended to create a private cause of action based upon a laboratory's failure to adhere to the provisions of CLIA." *Id.* at 659. Therefore, the trial court's denial of plaintiffs' motion for leave to amend was proper, albeit on different grounds than the ground articulated by the trial court. Even though the trial court did not rely on futility as a basis for its decision, this Court will affirm a trial court when it reaches the right result for the wrong reason. *Etefia, supra* at 470.

Affirmed.

/s/ Peter D. O'Connell
/s/ Bill Schuette
/s/ Stephen L. Borrello